Oyugi v Chief Land Registrar & 7 others (Civil Application E159 of 2023) [2024] KECA 399 (KLR) (19 April 2024) (Ruling)

Neutral citation: [2024] KECA 399 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPLICATION E159 OF 2023

HA OMONDI, JA

APRIL 19, 2024

BETWEEN

MARY AKUMU OYUGI ..... APPLICANT

AND

CHIEF LAND REGISTRAR ..... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL ..... 2ND RESPONDENT

NYANDO TOGO INVESTMENTS LIMITED ..... 3RD RESPONDENT

CIBIYA FARMS HOLDINGS LIMITED ..... 4TH RESPONDENT

MUHORONI SUGAR CO. LIMITED (IN RECEIVERSHIP) ... 5TH RESPONDENT

JOB OKUNA OYUGI ..... 6TH RESPONDENT

DOUGLAS ODHIAMBO OYUGI ..... 7TH RESPONDENT

JOSHUA OGANGO ..... 8TH RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment & Land Court at Kisumu (A.O. Ombwayo, J.) dated 29th March, 2023)

RULING

1. By a notice of motion dated 30th November 2023, made under Rules 4, 42, 47 of the *Court of Appeal Rules,* 2010) [The latter two now rules 44& 49 of the 2022 Rules], the applicant, Mary Akumu Oyugi seeks leave to file the appeal out of time, against the judgment in Kisumu Environment & Land Court ELC Case No, 357 of 2014 Job Okuna Oyugi & 3 Others v Chief Land Registrar & 4 Others; as the time limited for filing of the appeal against the judgment has lapsed; that upon granting the prayers, thereafter, directions for filing the appeal be provided; and the costs of the application be in the appeal.

2. The background to this application is that the applicant, as the 4th intended appellant, alongside 3(three) others, had filed a suit against the respondents, being ELC No. 357 of 2014, Job Okuna Oyugi & 3 Others v Chief Land Registrar & 4 others. The issue in dispute was the ownership of LRR No. 6016/1, which she claimed, belonged to her late husband, late Hezekiah Nelson Oyugi Ogango (the "deceased"); and was unlawfully transferred to the 3rd respondent and later to the 4th respondent. Among the orders sought were a declaration that the registration of the suit property by the 1st respondent to the 2nd - 4th respondents was null and void ab initio; and a rectification of the land register by cancelling the transfer to the 4th respondent; and restoring the title to the personal representatives of his estate, as the proprietors. Upon the matter being heard, the trial court dismissed the claim with costs.

3. Being dissatisfied with the outcome, the applicant and the 6th to 8th respondents instructed their then advocates on record, to file an appeal; and the said advocates actually initiated the process of filing an appeal by:

    i. Filing and serving a Notice of Appeal exhibited and marked 'MAO3', dated 30th March 2023

    ii. Filing and serving a letter dated 30th March 2023 exhibited and marked 'MAO4', requesting for a certified copy of the typed proceedings.

    The said advocates also prepared and shared a record of appeal (produced as the exhibit marked 'MAO5'), with the applicant and the 6th to 8th appellant; and informed them that they were in the process of having the appeal fixed for hearing.

    Lo and behold, on 1st November 2023 when the applicant instructed the firm of Kiarie & Odera Advocates to come on record on her behalf in the appeal, did she then realize that the appeal had not been filed.

4. Upon inquiring from the previous advocates why the appeal had not been filed, she was informed that a certified copy of the decree had not been obtained as the taxation of the costs at the High Court was still pending. Her present advocate, Leon Kiarie Ndekel a partner at Kiarie & Odera Advocates,advised her that the taxation of the costs at the High Court was not a bar to the filing of an appeal. Consequently, by an email dated 5th November 2023 (exhibited and marked 'MAO6'), the applicant issued instructions for the filing of the present application. It is her contention that the delay in filing the appeal is not inordinate and the reasons for the delay have been adequately explained; and that the mistake of counsel should not bar her from exercising my right to appeal.

5. The applicant also points out that in the event that the application is granted, the appeal can be filed within a short period of time as the record of appeal. A copy of the dummy record of appeal has already been prepared; and the respondents will not suffer any prejudice as they were served with both the notice of appeal and letter filed.

6. In opposing the application, the respondents through a replying affidavit sworn by Sarah Juma, an advocate in the 2nd respondent's office, state that the application is an abuse of court process, as there already exists an appeal No. E257 of 2023, dated 8th September 2023, served upon the Attorney General by the firm of Ogolla Okello and Company Advocates;

    > that the applicant has always had the tendency of changing advocates midstream, something she did with a frequency in the lower court; and is simply carrying over the same conduct, to this Court, so as to create confusion.

7. The 3rd respondent through an affidavit sworn by it's advocate, Mr. Owino Opiyo, confirms that the applicant did file a Notice of Appeal, but failed to file all the other requisite documents, and only moved to this Court to try and salvage the situation six months after the judgment. In addition, a new advocate has un-procedurally come on record in total disregard to the requirements under Rule 9 of the Civil Procedure Rules 2010; and to compound the situation, the previous advocate served the 3rd respondents with the record of appeal a day before the filing of the replying affidavit i.e. on 23rd January 2024; that the judgment of the trial court was delivered on the 29th March, 2023, and the reason being touted for the delay is described as unjustifiable as it cannot take more than six months to give instructions to the new advocates to take over the matter; in addition, that the applicant has not annexed any letter or means of communication to the previous advocate; and any response from them to buttress her allegations. It is on account of these factors that the 3rd respondent argues that the only rational inference to draw is that the present application is merely an afterthought, marred with falsehoods and ill conceived. That in any event, the applicant's advocates have been the same ones representing her since the institution of the suit, and are deemed to have been in constant communication on the progress of the case with the client; and the applicant cannot blame her former advocates since she had also a duty to play to ensure the appeal is timely filed.

8. In urging this Court to allow the prayers sought, the applicant through the written submissions draws from the decision in *Murai v Wainaina (No 4)* [1982] KLR 38, which held that such mistakes by counsel ought not to be the reason that a litigant is denied their opportunity to ventilate an appeal, as wrapped up in the words of Madan JA, as he then was) that:

> "A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a person of experience who ought to have known better has made a mistake. The Court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictates."

9. Further, that this Court has also held in *George Roine Titus & Another v John P Nanguri* Civil Application No Nai 249 of 1998 (UR) that a mistake is a mistake whether or not it originates from an advocate's ignorance or negligence and so long as it is genuine it does not disentitle an applicant to the discretion of the Court being exercised in its favour. The 2nd respondents did not file any written submissions; but the 3rd respondent filed written submissions which basically repeat the contents of the replying affidavit; and that the applicant will not suffer any prejudice as she can sue her previous counsel for damages as a result of breach of instructions.

10. This is a very curious situation, where the applicant says no appeal emanating from the decision by the ELC has been filed, although all the preliminaries towards filing an appeal had been undertaken by the previous counsel including filing and serving a Notice of Appeal; filing and serving a request for a certified copy of the typed proceedings; preparing and sharing a record of appeal with the applicant and her co-appellants. So, what is left? Certainly, the appellant in this case has not been passive; has actively shown interest and followed up on the appeal. The appellant was convinced that the appeal had been filed on time having been served with a copy of a record of appeal that she was informed had been filed; the 2nd respondent points out that there exists an appeal No. E257 of 2023, dated 8th September 2023, emanating from the very decision, being contested; and it has been served on the 2nd respondent, and the appeal has been registered, and assigned a number – a fact supported by the annexture exhibited. It would appear to me, as correctly pointed out by the 2nd respondent, that the applicant's impatience is her undoing, as it leads her to change counsel without establishing what is on the ground. It would

appear that whereas the 2nd respondent was served with the record of appeal, the 3rd respondent was not served with that record, until after this application had been filed; and the previous advocate rushed to do some patch work by serving the 3rd respondent.

11. I have considered the application, the grounds in support thereof, submissions filed, authorities cited and the law. The issue for determination is whether the application is deserving of the orders sought. Rule 79 of the *Court of Appeal Rules* 2022 provides that an intendend appellant shall, before or within seven (7) days after lodging the notice of appeal, serve copies thereof on all persons directly affected by the appeal. The discretion that I am called to exercise in the determination of this application is provided under Rule 4 of the Court of Appeal Rules which provides as follows:

> "The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."

12. Rule 4 of the *Court of Appeal Rules* does not provide for factors the court ought to consider in an application for extension of time but courts have devised appropriate principles to be applied in achieving a 'just' decision in the circumstances of each case. The case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 which is the locus classicus, laid down the parameters as follows:

> "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted." [underlined for Emphasis].

13. In the case *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*, Civil Application No.190 of 2019 observed that:

> "Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity."

14. How long was the delay in this instance? 6(six) months. What was the reason? From the trail of activities, the applicant genuinely believed that the appeal had been filed. There is no maximum or minimum period of delay set out under the law. However, the reason or reasons for the delay must be reasonable and plausible. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, this Court stated:

> "The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is

> the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."

15. Undoubtedly the notice of appeal should be lodged within 14 days of the delivery of the decision which it seeks to appeal against and served within 7(seven) days after lodging that actually happened. The cobweb crept in when the record of appeal was apparently filed and served on the 2nd respondent but left out the 3rd respondent; that action of service on the 2nd respondent clearly demonstrates a keen interest to pursue the appeal. Indeed, when she discovered that not everything was in order, the applicant moved with haste to appoint other advocates and issue instructions for the filing of the application.

16. Then comes the fly in the soup that the advocate on record has not complied with rule 9 of the *Civil Procedure Rules* 2010, and therefore has no right of audience.

17. Order 9, rule 5 provides that:

> A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.

The current advocate came on record at the appellate stage. Order 9, rule 9 provides that:

> When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court:
>
> i. upon an application with notice to all the parties; or
>
> ii. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be

Is this fatal to the applicant's status. I think there is a floating log in this sea of confusion created by the applicant's impatience, the record of appeal has been prepared; and served by the previous advocate, albeit out of time. So that even if the locus of the current advocate was to be found wanting, that document offers reprieve and shall be deemed as proper. I echo George Roine Titus & Another vs John P Nanguri (supra), that a mistake is a mistake whether or not it originates from an advocate's ignorance or negligence and so long as it is genuine it does not disentitle an applicant to the discretion of the Court being exercised in its favour. The mistake of the appellant's previous advocates should not deny the appellant an opportunity to ventilate her appeal.

18. Will the respondents suffer prejudice? I have already noted that a notice of appeal had been filed and served, within time, on all the respondents by the appellant's previous advocates. On the degree of prejudice to the respondents, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying him an extension, against the prejudice to the respondents in granting an extension. The applicant is aggrieved by the judgment; and the respondents were all along aware of this dissatisfaction and the applicant had already initiated the process of appealing against the decision. In the circumstances, an extension of time to allow the appellant to file an appeal will not prejudice the respondents.

19. I thus find that the applicant has demonstrated the existence of the parameters set out in Leo Sila Mutiso (supra). The upshot is that the notice of motion dated 3rd November, 2023 be and is hereby allowed. Accordingly, I make the following orders:

i. That the time within which to serve the respondents with the record of appeal is enlarged;

ii. That the record of appeal 8th dated and served on 23rd January, 2024 be deemed as properly served on the 3rd respondent, and shall be served on all the other respondents within 7 (seven) days from the date of this ruling.

iii. Costs of this application to abide by the outcome of the appeal.

DATED AND DELIVERED AT KISUMU THIS 19TH, DAY OF APRIL 2024.

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR